L. (S. C.) 80. But payment of the price may be made a condition precedent by special provision in the contract. *J. I. Case Threshing Machine Co.* v. *Smith,* 16 Ore. 381. The court in the principal case recognizes that payment of the purchase price was expressed in the contract as a condition precedent, yet it would not allow it that force, saying that "it is not every condition of this kind which can be regarded as a condition precedent, although expressed as such in the contract. Some consideration must always be given to the nature of the condition and the effect a noncompliance will have upon the rights of the party in whose favor it is reserved." The court distinguished between the principal case and *Furneaux* v. *Easterly & Son,* 36 Kan. 539, where the condition was not the payment of the purchase money, saying in that case, "The condition was not only reasonable, but it was material and necessary to protect the rights of the vendor." As a justification for its decision the court said: "The measure of damages for the failure to pay money when due is the interest on the money for the time payment is delayed, and it is apparent that the loss of the use of the $350 had no connection with the failure of plaintiff in error to make the plant answer the warranties and thus avoid the breach. The defendants, therefore, were not precluded or estopped from setting up the breach of warranty by the failure to pay the amount due when the plant was completed."

SALES—PASSING OF TITLE—WAIVER OF RIGHT TO RECLAIM.—Plaintiff sold to the defendant trust company a safe, to be paid for cash on delivery. The safe was delivered but was not paid for as agreed. Plaintiff drew on the purchaser on several occasions, but the drafts were returned dishonored. Much correspondence took place between the parties, in the course of which the trust company promised to pay at different times. None of these promises was kept. The trust company received the safe in July, 1904, and retained it until July, 1905, when it was sold to the defendant bank, and was used by both defendants jointly until the failure of the defendant bank in November, 1905. No demand was made for the safe until this failure. Then demand was made. Plaintiff sued to recover the safe. The trial court found that the sale was conditioned upon payment of the price on delivery, but that plaintiff, by its acts and conduct, waived whatever right it had to a recovery of the safe for non-payment. *Held,* that by the extension of time for payment, the plaintiff thereby waived the right to reclaim the safe. *Victor Safe and Lock Co.* v. *Texas State Trust Co. et al.* (1907), — Tex. —, 104 S. W. Rep. 1040.

When a sale is conditioned on payment on delivery, and the vendor allows the vendee to retain possession without exacting payment, the authorities are not agreed as to what change in the relation of the parties is made. The principal case quotes at length the opinion rendered in the case of *Felch* v. *Lewis,* — Pa. —, 67 Atl. Rep. 45, and which was noted in 6 MICH. LAW REV., 184 (Dec. 1907). In that case it was held that where a sale is for cash on delivery, and the seller delivers the goods, but the buyer fails to pay, the right of property does not pass with the possession; but, if the seller is tardy or negligent in asserting his right to retake the property, the delivery is absolute and title passes. The same rule is stated in *Lang* v.

Rickmers, 70 Tex. 108, 7 S. W. 527, as follows: "When the contract of sale is that goods sold shall be paid for with cash, * * * the sale is on condition that the payment be made, and, until this is done, the title to the goods remains in the vendor, notwithstanding they may have come into the possession of the vendee, unless it appears that they were delivered to the purchaser with intent to waive the condition of payment." The rule followed by other courts is to the effect that delivery without exacting payment raises the presumption that the delivery is absolute, and that the vendor has abandoned the security he had provided for the payment of the purchase money, and to have elected to trust the personal responsibility of the vendee. *Smith* v. *Lynes,* 1 Seld. (N. Y.) 41; *Farlow* v. *Ellis,* 15 Gray, 229; *Hammett* v. *Linneman,* 48 N. Y. 399; *Osborn* v. *Gantz,* 60 N. Y. 540; *Salomon* v. *Hathaway,* 126 Mass. 482; *Seed* v. *Lord,* 66 Me. 580; *Martin* v. *Wirts,* 11 Ill. App. 567; *Mich. Cent. R. Co.* v. *Phillips,* 60 Ill. 190. Under the facts in the principal case doubtless the same conclusion would have been reached by all courts, whatever the rule might be in their jurisdiction.

TRIAL—DISMISSAL—GROUNDS—FRAUD ON COURT.—Plaintiff was seeking to recover a claim against the estate of a deceased person. The county court disallowed the claim, and the plaintiff appealed to the district court. After the trial in the district court had proceeded so far that the cause had been submitted to the jury, the plaintiff was accused of having made a material alteration in an alleged book of accounts of transactions after it had been received as documentary evidence. The district judge, with the aid of a committee of lawyers, made an investigation and became convinced that the accusation was true. He thereupon discharged the jury from further consideration of the case, and dismissed the appeal. *Held,* fraud or imposition upon the court and against the defendant, practiced by a plaintiff during the progress of the trial, does not justify a dismissal of the action without a determination of its merits. *Fitch* v. *Martin* (1907), — Neb. —, 113 N. W. Rep. 796.

The principal case raises an interesting point as to how far a court may go to protect itself from fraud and to prevent its proceedings from being used as instruments of oppression. The court below based its dismissal of the action squarely upon the ground that courts possess the inherent power of protecting themselves from the consequences of deceit and of preventing their proceedings from being made instruments of oppression. The supreme court, however, bases its decision on the ground that every person has the constitutional right to be heard in court, and it clearly distinguishes *Gage County* v. *King Bridge Co.,* 58 Neb. 827, 80 N. W. 56, from the principal case. Courts have often been allowed to dismiss the action of the plaintiff on refusal to obey orders of the court. *Craft Refrigerating Co.* v. *Guinnipac Brewing Co.,* 63 Conn. 551, 29 Atl. 76, 25 L. R. A. 856; *Johnson* v. *Robinson,* 20 Minn. 170; *Turnpike Co.* v. *Baily,* 37 Ohio St. 104. But in these cases the powers of the court in regard to the dismissal of an action were greatly enlarged by statutes. But see *Fleurot* v. *Durand,* 14 Johns. 329, Anon. 89 Ala. 291, 7 L. R. A. 425; *Schroeder* v. *C. R. I. & P. Ry. Co.,* 47 Iowa 375.